

## Is McKinney Still Applicable to DoD Leases?

Sec. 2812 of the National Defense Authorization Act For Fiscal Year 2001 may have subtly removed any statutory requirement that DoD agencies provide HUD with notification that property will be made available for leasing under 10 USC 2667.

Under the Stewart B. McKinney Homeless Assistance Act (42 USC 11411), agencies are required to identify to HUD any property or buildings that are “excess property or surplus property or that are described as unutilized or underutilized in surveys by the heads of landholding agencies under section 202(b)(2) of the Federal Property and Administrative Services Act of 1949 (~~40 U.S.C. 483~~ 40 USC 483(b)(2)).” 41 CFR 101-47.801 establishes the standards that executive agencies shall use in identifying unneeded federal property, and 45 CFR 12a.1 defines “excess,” “surplus,” “unutilized,” and “underutilized” property in the use of federal property to assist the homeless. Under both regulations, “excess property means any property under the control of any Federal executive agency that is not required for the agency's needs or the discharge of its responsibilities, as determined by the head of the agency pursuant to 40 U.S.C. 483.” “Surplus property means any excess real property not required by any Federal landholding agency for its needs or the discharge of its responsibilities, as determined by the Administrator of GSA.” “Unutilized property means an entire property or portion thereof, with or without improvements, not occupied for current program purposes for the accountable executive agency or occupied in caretaker status only” “Underutilized means an entire property or portion thereof, with or without improvements which is used only at irregular periods or intermittently by the accountable landholding agency for current program purposes of that agency, or which is used for current program purposes that can be satisfied with only a portion of the property.”

10 USC 2667 is the controlling statute that authorizes military departments to lease ~~its~~ property, ~~to~~ receive rent, and accept consideration in kind. Prior to enactment of the FY01 National Defense Authorization Act, 10 USC 2667(a) specified that the military departments could lease real or personal property that was “(1) under the control of that department; (2) not for the time needed for public use; and (3) not excess property, as defined by section 3 of the Federal Property and Administration Services Act of 1949 (40 U.S.C. 472).” ~~However,~~ Since property to be leased by DoD under 10 USC 2667 could not be excess (or surplus) property, the only statutory connection to mandatory reporting under 42 USC 11411 was that the all leased property would necessarily be considered “unutilized” or “not occupied for current program purposes” because 10 USC 2667 required the property to be “not for the time needed for public use”. Sec. 2812 of the FY01 Defense Authorization Act struck paragraph (a)(2) of 10 USC 2667 and therefore removed any pre-condition that all property leased by DoD be considered “not for the time needed for public use”. The Authorization Act left intact the conditions that the leased property be “(a)(1) under the control of that department; and (a)(2) not excess property...”. Eliminating the “not for the time needed for public use” condition could

arguably be said to have eliminated any statutory requirement that all leased property necessarily be described as “unutilized” or “underutilized”. Use of the property by the agency to generate revenue for maintenance, restoration, construction, facilities operation support at the installation and for the military department might now arguably be considered as being utilized “for program purposes”. Recognizing leasing of non-excess property as fulfilling a “program purpose” would bring leased property in line with the status of licenses, permits, and easements, which also allow non-agency use of the property and generation of revenue for the agency but require no mandatory McKinney notification. POC is Jerry Williams DSN 880 6598.